

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original Recd. East of MAHNEY
74-1302

To be argued by
THOMAS R. MAHER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1302

UNITED STATES OF AMERICA,

~~—against—~~

CARLOS IVAN SANDOVAL,

Appeller.

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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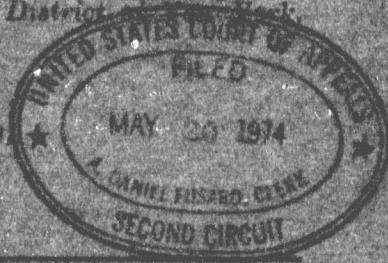


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1302

UNITED STATES OF AMERICA,

Appellee,

—against—

CARLOS IVAN SANDOVAL,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Carlos Ivan Sandoval appeals from a judgment of conviction entered October 26, 1973, in the United States District Court for the Eastern District of New York after a four day trial before the Honorable John R. Bartels, sitting without a jury.

The Indictment charged Sandoval in a single count with having continuously failed to report for induction from April 18, 1968 to December 17, 1971, the date of the indictment.

After conviction, Sandoval was sentenced on December 8, 1973, by Judge Bartels, for an indefinite term in accordance with Title 18, U.S.C. 5010(b) and execution was stayed pending appeal.

On appeal, appellant challenges the authority of the Director of Selective Service to establish a special order of call for New Mental Standards registrants.

Statement of the Case

Appellant Carlos Ivan Sandoval registered with Local Board No. 51 of the Selective Service System in Brooklyn on June 7, 1966. During the following several months, Sandoval underwent physical and mental examinations as well as routine processing, and on June 24, 1967, Sandoval was found qualified and available for military service.

In March of 1968, Local Board No. 51 received a Notice of Call (Gov't Exhibit 3) pursuant to 32 C.F.R. 1631.6 which required the local board to select and order for induction a total of 44 men by March 26, 1968. Immediately thereafter, Local Board No. 51 issued induction orders to 44 men, including appellant Sandoval, requiring them to report for induction on that date. In addition, the local board prepared a Delivery List (SSS Form 261) which listed the 44 inductees in their order of call—the oldest first, with Sandoval's name appearing in the twentieth position on the list.

At trial, appellant Sandoval invoked the order of call defense, claiming that he was unduly prejudiced because he was ordered for induction out of sequence, in violation of 32 C.F.R. 1631.7.

During the course of trial, it was stipulated by the parties that in order for Sandoval to succeed in his "order of call" defense, he must show that a minimum of 24 men were improperly passed over by the Local Board so as to reach appellant; for if less than this number were improperly passed over, appellant would still have been reached for induction and therefore was not prejudiced.*

* The Government conceded that it had no explanation as to why one registrant was passed over. His record was destroyed and the information available was not clear. Thus, the figure of 24 was agreed upon, rather than 25 (Tr. 195).

Mrs. Cooper who was Chief Clerk of Local Board 51 during the time in question, and an employee of Selective Service for 11 years, testified as to the identity of the "new mental standard" registrants and how she was instructed to call them (Tr. 25). The Local Board would receive two calls from State Headquarters, one for the so called "regular" registrants and the other for a certain number of new mental standards and each group was then selected in the order of call in accordance with 32 C.F.R. 1631.7, i.e., oldest first. In addition to this testimony, the written instructions given the Local Board as to how to bring about the induction of the New Mental Standards were received in evidence (Government Exhibit 4). Also in evidence (Government Exhibit 3) was the Notice of Call for the induction date of appellant, i.e., March 26, 1968 and the Notice of Call for an earlier induction date of March 21, 1968. These Notice of Calls showed that on March 21, 1968, the Local Board was to select 19 regular registrants and 11 New Mental Standard registrants for induction, while on March 26, 1968, the Local Board was to select 44 regular men for induction as there was no new mental standards authorized to be called by the State Director.

Further evidence of the creation of the New Mental Standards classification was by way of a Letter to All State Directors, dated December 2, 1966, and signed by the then Director of Selective Service, Lewis B. Hershey (Government Exhibit 10) which announced the new lowered mental standards of the Armed Forces and that the Secretary of Defense had requested that Selective Service deliver only 20,000 of such registrants meeting the new standards for induction, throughout the country for the period of February 1967 to September 1967 and that additional guidelines and quotas would be furnished at a later date.

The defense at the outset, alleged that 63 men who were older than Sandoval were improperly passed over.

At the termination of the trial, the defense conceded and stipulated that 23 of the 63 were not improperly passed over. Judge Bartels went further and found that the Government "has proven beyond a reasonable doubt that at least 53 of the 63 challenged registrants were not arbitrarily or capriciously passed over," and there was no need to pass on the propriety of not calling the 10 remaining challenged registrants prior to Sandoval (Court's Opinion, Appendix, page 14).

Among the 53 men who were properly not called prior to Sandoval, were 31 registrants found by the Court to be so called "New Mental Standards." These were registrants, who prior to December 1966, were found by the Armed Forces not to be fit for military service. However, by a change or lowering of the Armed Force's mental standards, as of December 1966, such men were to be re-evaluated and if found fit for service, were to be gradually absorbed into the military.

ARGUMENT

The authority of the Director to establish a special order of call for New Mental Standards registrants has been recognized by this Court in *United States v. Weintraub*, 429 F.2d 658 (2d Cir. 1970), cert. denied, 400 U.S. 1014 (1971).

In essence, appellant Sandoval challenges this Court's recent decision in *United States v. Weintraub*, *supra*. Appellant seems to argue that because *Weintraub* dealt with several issues, including the establishment of a special order of call for New Mental Standards registrants, that its value as precedent is somehow diminished. A simple reading of the Court's opinion in *Weintraub* demonstrates beyond any doubt that the Court specifically addressed itself to the New Mental Standards issue and held that the Direc-

tors' power to postpone the induction of New Mental Standards registrants could be found in 32 C.F.R. 1632.2(a). The Court also recognized the desirability of gradually inducting these registrants into the armed forces. In his opinion for the unanimous panel, Judge Smith stated the following:

The New Mental Standards, which became effective on December 1, 1966, were a reduction in the minimum mental requirements for induction into the Armed Forces. In the instant case each of the six registrants who were New Mental Standards cases had previously been found ineligible for induction on mental grounds. The procedure used in processing them under the New Mental Standards was for the local board to send their papers to the Armed Forces Examining and Entrance Station where they had previously been tested. They were then found acceptable under the new standards and were reclassified I-A.

The Director of Selective Service established a special order of call for New Mental Standards cases. When the calls for the month were prepared for each state by the National Headquarters of the Selective Service System, the call indicated the number of New Mental Standards registrants to be included separately from other registrants. The State Directors of Selective Service then allocated the quota of regular and New Mental Standards registrants to the various local boards under his jurisdiction. Delivery lists were kept separate. Local Board No. 65 was requested to select and deliver for induction 39 regular registrants and 1 New Mental Standards registrant in June 1967.

We conclude that the special treatment of New Mental Standards registrants was proper under the applicable Selective Service Regulations. The Director of Selective Service is empowered, at any time

prior to the issuance of orders to report for induction, to postpone "for a good cause" the issuance of an induction order "until such time as he may deem advisable." 32 C.F.R. § 1632.2(a) (1970). There is no restriction of this power to individual registrants; thus, the Director, pursuant to this section, can postpone the induction of a class of registrants if he has good cause for doing so. The reasons for assimilating New Mental Standards registrants into the Army at a slower rate than if they were incorporated *en masse* into the pool of registrants available for service are obvious. It was deemed undesirable to have any substantial numbers of these New Mental Standards registrants inducted into the Armed Forces at one time.

The Government respectfully submits that the decision in *Weintraub* must control.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

May 16, 1974

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN _____, being duly sworn, says that on the 17th _____
day of May 1974 _____, I deposited in Mail Chute Drop for mailing in the
S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, two copies of the brief for the appellee _____
which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Levy, Gutman, Goldberg & Kaplan, Esqs.
363 Seventh Avenue
New York, New York 10001

sworn to before me this
17th day of May 1974
Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

